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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-826

IGNATIUS J. BROUSSARD, JR.,

Petitioner,

vs.

COLONEL RODERICK R. PATTON, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Reply of Petitioner to Brief of Respondents in Opposition.

We thank respondent for noting our error in citing *Juhl v. United States,* (Ct. Cl.) 383 F. 2d 1009, instead of the underlying decisions of this court on the point involved, that duly authorized regulations have the force and effect of law. Those decisions, repeating that point again and again, and spread over almost a century, have embedded it in the basic law of this nation. They include *Ex Parte Reed,* 100 U.S. 13, 22; *Boske v. Comingore,* 177 U.S. 459; *United States ex rel. Bilokumsky v. Tod,* 263 U.S. 149, 155; *Bridges v. Wixon,* 326 U.S. 135, 150-156, and *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 265. And the point on which the *Juhl* case was reversed in *United States v. Augenblick,* 393 U.S. 348, 356, has nothing

to do with any of the points on which this petition for certiorari is based.

Nor does *Augenblick*, nor any of the other cases cited by respondents, say that a violation of due process, or a lack of jurisdiction, is any the less such because it occurs in a court-martial case. *Augenblick* merely excluded from civil review "any error that may be committed in evaluating the evidence" (p. 352). Any error in that case, this court also found, did not present a " 'constitutional' defect" (p. 352). There was the same situation in *Burns v. Wilson*, 346 U.S. 137. This court held there that a civil court could not grant the writ of habeas corpus "simply to re-evaluate the evidence" (p. 142), "to re-examine and reweigh each item of evidence" (p. 144). And in *Hiatt v. Brown*, 339 U.S. 103, this court held that the civil courts had no power to review a court-martial in respect to "the sufficiency of the evidence", or "the adequacy of the pretrial investigation" (p. 110). The decision of the court-martial was final, this court there indicated, if "the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers" (p. 111). And in *O'Callahan v. Parker*, 395 U.S. 258, 267, and *Toth v. Quarles*, 350 U.S. 11, 14-15, it was held, as we pointed out in our petition, at page 5, that jurisdiction of a court-martial depends upon the military status of the accused, not only at the time of the offense, but also at the time of trial.

Respondent, however, would contend that petitioner was still in the armed services, that there was no "termination of his military status," even though he had been notified that the statute of limitations had expired so that, under regulations having the force and effect of

law, he could not be "returned to military control". Respondent's assumption, at page 4, that such a termination could be "rescinded" necessarily contradicts itself, for it would mean that after petitioner had become a civilian by virtue of such termination, and free of military control, he was still in the armed services and subject to its control.

This point is of the greatest importance because of the higher level in which the constitutional rights of the civilian are held as compared to those of a member of the armed forces. The very court which decided the case of *United States v. Anderson*, 38 C.M.R. 386, referred to in the petition, page 3, involving a member of the armed forces, defined the term involved there, "time of war", in the case instead of a civilian accompanying the armed forces, as meaning only war established by a declaration of war by Congress in accordance with the Constitution. *United States v. Averette*, 41 C.M.R. 363.

Moreover, and this is still more basic, to leave, as respondents would, to the *final* judgment of a court-martial, any question of fact or law determinative of status as between military and civilian at the time of trial, would leave to the court-martial the final determination of its own jurisdiction, which is clearly contrary to the decisions of this court above cited, including the very decisions relied on by respondent.

Respectfully submitted,

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